Filed 2/9/10 J.F. Shea Construction v. County of Siskiyou CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

J.F. SHEA CONSTRUCTION, INC. et al., Plaintiffs and Appellants, v. COUNTY OF SISKIYOU et al., Defendants and Respondents; EAGLE PEAK ROCK & PAVING, INC., Real Party in Interest and Respondent.	C062117 (Super. Ct. No. SCCVPT081178)

J.F. Shea Construction, Inc., a contracting and construction materials business (Shea), and Mount Shasta Tomorrow, a nonprofit environmental organization (Mount Shasta), filed a petition for writ of mandate and a complaint for declaratory relief against the County of Siskiyou and Siskiyou County Board of Supervisors (together the County). Shea and Mount Shasta alleged the County's approval of the application of

Eagle Peak Rock & Paving, Inc. (Eagle Peak) for a conditional use permit for a temporary portable asphalt batch plant violated the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.), and conflicted with a section of the County's Zoning Code. Contending the action was moot, the County and Eagle Peak filed motions to dismiss the case. The trial court granted the motions to dismiss based on mootness and on a finding that Shea and Mount Shasta lacked standing to bring the action. Shea and Mount Shasta appeal the ensuing judgment of dismissal. Since dismissal was proper based on mootness, we need not address standing.[1] We shall affirm the judgment.

BACKGROUND

Siskiyou County Code section 10-6.1502, subdivision (i), authorizes the County's issuance of a conditional use permit for "[t]emporary portable asphalt and/or concrete batch plants incidental and accessory to an off-site public construction project, with one mile radius notification requirement, not to exceed the life of the construction project, with one year review, not to exceed two (2) years." (Hereafter § 10-6.1502(i).)

---

[1] In connection with its argument regarding standing, Shea and Mount Shasta have filed a request for judicial notice of a declaration of Shea's vice president and general manager submitted in connection with the opposition of Shea and Mount Shasta to Eagle Peak's motion for attorney fees. The County and Eagle Peak have filed opposition to the request. We deferred ruling on the request for judicial notice and now deny it, without reaching the merits, on the ground that it is immaterial to our conclusion on appeal.

Eagle Peak obtained two use permits; the second permit is the subject of this appeal. In February 2008, the County approved a mitigated negative declaration and use permit (UP-07-11) allowing Eagle Peak to install and operate a temporary portable asphalt batch plant at a gravel quarry for a road construction project scheduled to take place in the summer of 2008 on Trinity Mountain Road.

In March 2008, Eagle Peak applied for amendment of its use permit to allow the use of the batch plant at the quarry for its summer 2008 construction work on a county road project known as the Old Highway 99 project and several other projects. The Siskiyou County Planning Commission approved the application as a separate use permit (UP-08-07) solely for Eagle Peak's estimated 25 days of work on the Old Highway 99 project and approved an associated mitigated negative declaration. Shea appealed the Planning Commission's approval of UP-08-07 and the mitigated negative declaration to the County Board of Supervisors. The Board of Supervisors denied the appeal in July 2008.

In August 2008, Shea and Mount Shasta (together petitioners) filed this action alleging two causes of action. In their first cause of action, petitioners allege the County violated CEQA in approving the mitigated negative declaration and use permit UP-08-07. In their second cause of action for declaratory relief, petitioners alleged an actual and present controversy existed between the parties regarding the interpretation of the County's zoning code. Specifically,

petitioners contended the County could not approve Eagle Peak's use permit (UP-08-07) because it conflicted with section 10-6.1502(i) in not being located "proximate" to the Old Highway 99 project. Petitioners also alleged the County's staff believed an applicant could apply for and potentially obtain a series of separate use permits under section 10-6.1502(i) that would allow the applicant to operate a temporary batch plant at a single site for a full construction season. Petitioners asserted this would, in effect, amount to the approval of a de facto permanent regional batch plant in violation of state and county law.

In January 2009, the County filed a motion to dismiss the action on the ground that the issues were moot. The County supported its motion with the declaration of Terry Barber, the Director of Public Health and Community Development for Siskiyou County, the declaration of Scott Waite, the Engineering and Land Development Manager in the Public Works Department of Siskiyou County, and a request for judicial notice of several sections of the County's zoning code.

As relevant to resolution of this appeal and the two use permits, Barber declared: the work by Eagle Peak on the Trinity Mountain Road project and the Old Highway 99 project had been completed; Eagle Peak's rights to operate a temporary asphalt batch plant at the Richard Moore Gravel quarry under UP-07-11 and UP-08-07 had terminated; Eagle Peak was required to remove the temporary batch plant from the quarry; Eagle Peak did not then or in the future have any right to operate a temporary batch plant under the use permits; there were no use permits

issued in the county under section 10-6.1502(i) that had not terminated; and there were currently no applications pending for a use permit under section 10-6.1502(i).

In support of the County's motion to dismiss, Waite declared: the work by Eagle Peak on the Old Highway 99 project was completed by October 9, 2008; the County recorded a notice of completion of the project on October 22, 2008; and he had inspected the gravel quarry on January 5, 2009, and at that time the temporary asphalt batch plant installed at the quarry pursuant to UP-07-11 and UP-08-07 had been removed with the exception of a single trailer that could not be operated as a batch plant. All activity permitted pursuant to UP-07-11 and UP-08-07 had been terminated.

Eagle Peak also filed a motion to dismiss based on mootness. Eagle Peak supported its motion with a declaration by its president, Tony Cruse. As relevant to this appeal, Cruse declared: Eagle Peak's operation of the temporary asphalt batch plant under UP-07-11 began on June 26, 2008, and finished on July 11, 2008; and work under UP-08-07 began on August 14, 2008, and finished on September 16, 2008. He considered both use permits to have expired on September 16, 2008. He acknowledged Eagle Peak had no claim to any further rights under the permits.

Petitioners opposed the motions to dismiss. Petitioners contended the action was not moot, but asked the court to exercise its discretion to consider the issues even if it found the action moot because the issues involved matters of continuing public interest that are likely to recur.

Petitioners submitted no opposing declarations or other evidence.

The trial court granted both motions to dismiss and entered a judgment of dismissal.

DISCUSSION

I.

The First Cause Of Action For Violations Of CEQA Is Moot

An action is moot if it is impossible for the court to grant any effectual relief. (*Association for a Cleaner Environment v. Yosemite Community College Dist.* (2004) 116 Cal.App.4th 629, 641; *Downtown Palo Alto Com. for Fair Assessment v. City Council* (1986) 180 Cal.App.3d 384, 391-392; *Hixon v. County of Los Angeles* (1974) 38 Cal.App.3d 370, 377-379.)

The relief contemplated in a CEQA action is described in Public Resources Code section 21168.9 (section 21168.9) as follows: "(a) If a court finds, . . . , that any determination, finding, or decision of a public agency has been made without compliance with this division, the court shall enter an order that includes one or more of the following:

(1) *A mandate that the* determination, finding, or *decision be voided by the public agency*, in whole or in part.

(2) *If* the court finds that *a specific project activity or activities will prejudice the consideration or implementation of particular mitigation measures or alternatives* to the project, *a mandate that the public agency and any real parties in interest suspend any or all specific project activity or activities*,

pursuant to the determination, finding, or decision, that could result in an adverse change or alteration to the physical environment, *until the public agency has taken any actions that may be necessary to bring the determination, finding, or decision into compliance* with this division.

(3) *A mandate that the public agency take specific action as may be necessary to bring the determination, finding, or decision into compliance* with this division." (Italics added.)

Petitioners' CEQA cause of action challenges only the County's issuance of UP-08-07. It is undisputed the road construction projects serviced by the temporary asphalt batch plant permitted by UP-08-07 (and indeed UP-07-11) have been completed. The batch plant was installed, operated, and most importantly--as of January 2009--removed. There is no activity to suspend, no possible mitigation measures that can be imposed, or no further public agency action that can be taken with respect to the CEQA review of this temporary asphalt batch plant. (§ 21168.9, subd. (a)(2) & (3); cf. *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1203-1204 [City could reject shopping center(s), require additional mitigation, modification, or removal]; *Association for a Cleaner Environment v. Yosemite Community College Dist., supra,* 116 Cal.App.4th at p. 641 [mitigation measures possible--relocation of shooting range]; *Woodward Park Homeowners Assn. v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, 889 [modification or removal of car wash project possible].)

Petitioners argue, however, that their cause of action for violations of CEQA is not moot because a court could "issue a writ of mandate requiring the County to void the Initial Study/Mitigated Negative Declaration it relied on for this project so that the County cannot tier from the document or use it for any future approval." (See § 21168.9, subd. (a)(1).)

Public Resources Code section 21068.5 defines "tiering" as "the coverage of general matters and environmental effects in an environmental impact report prepared for a policy, plan, program or ordinance followed by narrower or site-specific environmental impact reports which incorporate by reference the discussion in any prior environmental impact report and which concentrate on the environmental effects which (a) are capable of being mitigated, or (b) were not analyzed as significant effects on the environment in the prior environmental impact report."[2] Somewhat related to the concept of tiering, the CEQA Guidelines authorize the preparation of an addendum to an EIR or negative declaration for changes to a project that are not substantial.

---

[2] We have described tiering as "'a process by which agencies can adopt programs, plans, policies, or ordinances with [environmental impact reports (EIRs)] focusing on "the big picture," and can then use streamlined CEQA review for individual projects that are consistent with such . . . and . . . are consistent with local agencies' governing general plans and zoning.'" (*Koster v. County of San Joaquin* (1996) 47 Cal.App.4th 29, 36; see Remy et al., Guide to CEQA (Cal. Environmental Quality Act) (11th ed. 2007) Tiering, pp. 603-604, 613-614.)

(Cal. Code Regs., tit. 14, §§ 15162, 15164; see *Benton v. Bd. of Supervisors* (1991) 226 Cal.App.3d 1467, 1477-1481, 1482-1484.)

Petitioners have not shown the initial study/mitigated negative declaration prepared by the County for UP-08-07 is a first tier document. The document is specific to the batch plant located at the gravel quarry during the summer of 2008. It does not discuss general policy or plans for batch plants in the County or otherwise evaluate the "big picture." And as the project has been completed and the batch plant removed, there is no likelihood of changes or modifications to the project that could be assessed by way of an addendum. Petitioners' concern over tiering is unfounded.

Nevertheless, petitioners argue it is very likely the County "will recycle the same skeletal template of the Initial Study/Mitigated Negative Declaration it reused in this case."[3] Petitioners believe this is likely because the County "maintains that significant impacts will never occur in connection with temporary batch plants by virtue of the short term nature of each permit." In support of this assertion, petitioners cite us to a portion of the staff report for UP-08-07 that states:

---

[3] The "reuse" petitioners are apparently referencing is the initial study and mitigated negative declaration for UP-08-07 after the initial study and mitigated declaration for UP-07-11. However, any similarity in these environmental review documents is unremarkable given that the application for UP-08-07 requested only additional use of the same batch plant operated by the same applicant in the same location in the same season as UP-07-11.

"Based upon the fact that the batch plant facility is a temporary use of the land, that would only operate for a total of 78 days during the life of the permit, having negligible or no permanent effects on the environment with the mitigation measures that have been incorporated, it is reasonable to conclude that a mitigated negative declaration is appropriate for this project." Petitioners also cite us to a letter written by a company called Air Permitting Specialists to the County's Planning Department. The letter refers to UP-08-07 as a "small" and "temporary" project and suggests that "[g]iven the fact that this is a small project and that it will use the latest emission control technologies . . . , it is reasonable to conclude that impacts will be less than significance [*sic*]. Projects several times the size of this project routinely undergo CEQA review with detailed emission analysis and in these cases the project[s] have successfully demonstrated that impacts would be less than significant. Therefore, one can infer that the current project would have minimal impact." Petitioners cite us to several pages of the County's and Eagle Peak's trial briefs where they emphasize the temporary and short-termed nature of this project.

None of these references support petitioners' assertion that the County maintains significant impacts will *never* occur in connection with temporary batch plants because of their short term nature. Rather, it appears the County believed a mitigated negative declaration was appropriate for *this* particular batch

plant in the specific location of the quarry with the mitigation measures imposed given its temporary and short termed nature.

Petitioners believe, however, that the County will use the same initial study/mitigated negative declaration to satisfy its CEQA duties for future permits. Petitioners claim the County "has stated its belief that it is entitled to do so." In support of this claim, petitioners cite the portions of the record we have already addressed. The only new portion of the record cited is a portion of analysis in another staff report outlining the *staff's* belief that multiple construction projects could appropriately be covered by a single application for a use permit under section 10-6.1502(i), but that "in an abundance of caution," staff was recommending limiting UP-08-07 to the Old Highway 99 construction project. The staff report for the appeal of the Planning Commission's approval of UP-08-07 to the Board of Supervisors states the same thing. We are cited to no place in the record where the County states its belief that it can use the same initial study/mitigated negative declaration for all future applications for a use permit to operate a temporary batch plant.

Petitioners simply have not shown that a writ of mandate voiding the approval of UP-08-07 (§ 21168.9, subd. (a)(1)) is necessary or appropriate relief in this case. Petitioners' first cause of action alleging CEQA violations is moot. (*Hixon v. County of Los Angeles, supra,* 38 Cal.App.3d 370, 377-379.)

II.

The Second Cause Of Action For Declaratory Relief Lacks An Actual Controversy

Code of Civil Procedure section 1060 (section 1060) provides, in relevant part: "Any person interested under a written instrument, . . . , or under a contract, or who desires a declaration of his or her rights or duties with respect to another . . . may, *in cases of actual controversy* relating to the legal rights and duties of the respective parties, bring an original action . . . in the superior court for a declaration of his or her rights and duties . . . . He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time. . . . The declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought." (Italics added.)

An actual controversy exists and declaratory relief is appropriate where it is alleged an agency has a policy or pattern and practice of ignoring or violating applicable laws. (*Californians for Native Salmon Etc. Assn. v. Dept. of Forestry* (1990) 221 Cal.App.3d 1419, 1424-1425, 1427-1428 (*Californians for Native Salmon*); see *East Bay Mun. Utility Dist. v. Department of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1113, 1121-1124.)

The problem for petitioners here is that their second cause of action for declaratory relief of section 10-6.1502(i) did not

allege any policy or pattern and practice by the County with respect to its review of temporary batch plant use permits. Petitioners alleged the County could not approve a specific use permit (UP-08-07) because it conflicted with section 10-6.1502(i) in not being located "proximate" to the Old Highway 99 project. Petitioners also alleged a general belief of County *staff* that "so long as the applicant terminates each use permit upon completion of the project, the Applicant *could* apply for and *potentially* operate a full construction season on a series of individual temporary batch plant use permits[,]" thus allowing in effect the approval of a de facto permanent regional batch plant in violation of state and County law. (Italics added.) But petitioners did not allege the County had ever acted on such belief.

Petitioners did not allege or submit in opposition to the motions to dismiss any evidence that the County had any pattern and practice of approving such a series of temporary batch plant use permits. Although petitioners now argue on appeal that the County has a pattern and practice of treating the impacts of temporary or short term projects as *per se* insignificant for purposes of CEQA, they cite only a few isolated portions of the record where the temporary and short term nature of this particular project (UP-08-07) are emphasized. Petitioners have not shown the county has engaged in any such pattern or practice, thus declaratory relief is not appropriate.

Petitioners contend, however, that their cause of action for declaratory relief is not moot because the court could enter

a declaratory judgment that the County's interpretation of section 10-6.1502(i), as not including a proximity requirement and allowing a series of use permits, is unlawful. Petitioners cite a number of cases for the proposition that a cause of action for declaratory relief is appropriate when it is alleged an ordinance was improperly applied, the ordinance is still in force, and a difference of opinion as to its legal effect still exists. (*Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716, 1723 (*Alameda County Land Use Assn.); Yorty v. Los Angeles City Council* (1966) 239 Cal.App.2d 138, 141 (*Yorty*).) "Declaratory relief is appropriate to obtain judicial clarification of the parties' rights and obligations under applicable law." (*Californians for Native Salmon, supra*, 221 Cal.App.3d at p. 1427; see also, *Zeitlin v. Arnebergh* (1963) 59 Cal.2d 901, 905-906 (*Zeitlin*); *Walker v. County of Los Angeles* (1961) 55 Cal.2d 626, 636-637 (*Walker*); *Mefford v. Tulare* (1951) 102 Cal.App.2d 919, 922 (*Mefford*).)

A review of these cases reveals a critical distinction. In each of the cited cases, the ordinance or other law was not only still in force in the abstract, but it was likely to continue to be applied to, or have a genuine effect on, the parties before the court. There was an actual controversy.

For example, in *Alameda County Land Use Assn., supra,* 38 Cal.App.4th 1716, several cities and a county entered into a memorandum of understanding (MOU) agreeing to use their best efforts to adopt certain specified goals and policies for a particular 13,000 acres of open space into their respective

general plans. (*Id.* at pp. 1719-1720.) Two individuals owning property in the area covered by the MOU and a number of nonprofit organizations representing residents or property owners in the area filed an action to obtain a declaration that the MOU was invalid on its face and as applied. (*Id.* at p. 1720.) The court found there was no actual controversy concerning the specific application of the MOU since the plaintiffs admitted they had not yet attempted to obtain any amendment of the general plans, but plaintiff's facial challenge to the validity of the MOU did present an actual controversy. (*Id.* at p. 1723.) The appellate court concluded declaratory relief was appropriate to address the claim that the cities and county had impaired the future exercise of their own legislative authority by executing the MOU. (*Id.* at pp. 1723-1724.) The court's conclusion regarding the availability of declaratory relief is readily understandable as the significant effect of the validity of the MOU on property owners and associations of property owners covered by it is apparent.

In *Yorty, supra,* 239 Cal.App.2d 139, the Mayor of the City of Los Angeles sought a peremptory writ of mandate compelling the City Council to provide sufficient funds to cover the salaries of all personnel authorized for the Mayor's office by a city ordinance. (*Id.* at pp. 139-140.) While the court found portions of the action to be moot, it concluded there was still an actual controversy over whether the City Council's previous refusal to budget funds for the positions was a legislative rescission of the determination in the city ordinance that the

positions were necessary. (*Id.* at p. 141.) The resolution of such issue was important to the City's future budgets. Clearly, the issue would recur and impact the Mayor until it was determined.

In *Californians for Native Salmon, supra*, 221 Cal.App.3d 1419, plaintiffs challenged an alleged pattern and practice of the Department of Forestry to untimely respond to public comment and fail to address cumulative impacts in its review of timber harvest plans (THP). (*Id.* at pp. 1424-1425.) Plaintiffs alleged a list of 65 approved THP as illustrative of the alleged practice. (*Id.* at p. 1425.) Under such circumstances, it was reasonable to infer the Department's practice would continue and would continue to be challenged until the issue was resolved. In this context, the court stated "[d]eclaratory relief is appropriate to obtain judicial clarification of the parties' rights and obligations under applicable law." (*Id.* at p. 1427.)

The relative certainty of the application of the ordinance or statute and a resulting dispute between the parties in the future underlies a number of other cases finding declaratory relief appropriate. (*Zeitlin, supra,* 59 Cal.2d 901, 905-907 [bookseller and prospective reader of a specific book sought declaratory judgment that the book was not obscene and sale of it would not be a crime as claimed by Los Angeles City Attorney]; *Walker, supra,* 55 Cal.2d 626, 629, 636-637 [controversy between county employees and board of supervisors over the meaning of a section of the county charter pertaining to determination of the employees' wage levels]; *Cook v. Craig*

(1976) 55 Cal.App.3d 773, 779-780 [plaintiffs' requests to the California Highway Patrol (CHP) for copies of their rules and procedures regarding citizen complaints of police conduct still at issue despite voluntary disclosure of some information by CHP]; *Mefford, supra,* 102 Cal.App.2d 919, 921-922 [property owner who wanted to subdivide and improve his property brought declaratory relief action to test validity of city ordinance setting forth certain requirements for subdivision].)[4]

Here in contrast, we have very little information in the record regarding the frequency or quantity of applications for use permits under section 10-6.1502(i). There are no allegations in the petition/complaint addressing such matters or asserting that Shea, or for that matter Eagle Peak, likely would be an applicant in the future. Certainly we cannot say it is common knowledge that applications for such use permits are a regularly recurring event. In support of its motion to dismiss, the County submitted a declaration in which its Director of Public Health and Community Development declared that there were no use permits issued in the county under section 10-6.1502(i) that had not terminated and that there were currently no

---

[4] Petitioners also rely on *San Diego Trust & Savings Bank v. Friends of Gill* (1981) 121 Cal.App.3d 203 (*San Diego Trust*) to argue declaratory relief is appropriate when interpretation of an ordinance is at issue. However, declaratory relief was allowed in such case based on the exception to mootness for issues of continuing public interest that are likely to recur. (*Id.* at p. 209.) We consider the application of such exception to this case next.

applications pending for a use permit under section 10-6.1502(i). In opposition to the motion to dismiss, petitioners failed to supply any contrary evidence or evidence showing applications for use permits allowing temporary batch plants are likely recurring events.

A plaintiff seeking declaratory relief must show more than a difference of opinion regarding a legal issue. (*Wilson v. Transit Authority of Sacramento* (1962) 199 Cal.App.2d 716, 722-723.) Declaratory relief is not available to provide judicial answers to theoretical, hypothetical, or academic questions. (*Id.* at pp. 722-724.) It is not the role of the court to provide advisory opinions. (*Ibid.*) Declaratory relief is appropriate only when there is a "probable" future controversy relating to the legal rights and duties of the parties (*County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 606; *Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739, 746-748), not a "conjectural" future controversy. (*Merkley v. Merkley* (1939) 12 Cal.2d 543, 547; see *BKHN, Inc. v. Department of Health Services* (1992) 3 Cal.App.4th 301, 308-311.)

On the state of the record here, we conclude the trial court did not err in finding petitioners' cause of action for declaratory relief moot. Petitioners have failed to show an actual controversy.

III.

The Trial Court Did Not Abuse Its Discretion In Declining To Exercise Its Equitable Discretion To Address The Issues

"Under an established exception, 'If an action involves a matter of continuing public interest and the issue is likely to recur, a court may exercise an inherent discretion to resolve that issue, even though an event occurring during its pendency would normally render the matter moot.' [Citation.]" (*Downtown Palo Alto, supra,* 180 Cal.App.3d 384, 391.) The appellate court in *Downtown Palo Alto* exercised its discretion under this exception because there was testimony that 50 cities had enacted ordinances, under the same statutory authority, similar to the one rescinded by the City of Palo Alto. And the issue of whether strict or merely substantial compliance with the statutory notice requirements was an issue of public concern which could recur in Palo Alto or more likely in a number of other cities. (*Id.* at pp. 391-392.)

Petitioners bring our attention to a number of cases in which courts have similarly exercised their equitable jurisdiction to consider issues otherwise moot. (See, e.g., *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1278 ["Whether a public entity can approve a development project that creates more jobs than housing is a matter of public interest and likely to recur"]; *Rawls v. Zamora* (2003) 107 Cal.App.4th 1110, 1113 [appropriate to consider issues raised by write-in candidate for county sheriff who intended to run again and challenged constitutionality of statute requiring experience

in law enforcement]; *Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479 [likely recurrence of same controversy between parties who had fully litigated issues supported exercise of discretion to address merits]; *Friends of Cuyamaca Valley v. Lake Cuyamaca Recreation & Park Dist.* (1994) 28 Cal.App.4th 419, 424-425 [necessity of CEQA assessments for annual duck hunting seasons an issue of public importance likely to arise in the future].)[5]

Petitioners also note that application of this discretionary exception is particularly appropriate where the agency action is likely to be repeated yet evade judicial review. (*Californians for Alternatives to Toxics v. Department of Pesticide Regulation* (2006) 136 Cal.App.4th 1049, 1069; *Hammond v. Agran* (1999) 76 Cal.App.4th 1181, 1186; 2 Kostka &

---

[5] Petitioners' cases include *West Bay Sanitary Dist. v. East Palo Alto* (1987) 191 Cal.App.3d 1507, 1510 and footnote 4 [whether a municipality may condition issuance of an encroachment permit in a manner which gives it in effect a veto over permit determinations made by a sanitary district for the discharge of industrial wastewater an issue of public interest likely to recur]; *San Diego Trust, supra,* 121 Cal.App.3d 203, 209 [particularly appropriate to reach issue of continuing public interest where it is likely to affect the future rights of the parties before the court, here the importance of preserving historical sites was such an issue of continuing public importance]; *Simpson v. Superior Court* (2001) 92 Cal.App.4th Supp. 1, 4 ["the correct interpretation and application of the law concerning applications for waivers for court costs is a matter of continuing public interest and is a matter which is likely to recur, especially in residential unlawful detainer actions presented within the jurisdiction of limited civil courts"].

Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2009) § 23.114, p. 1258.)

Once again the problem for petitioners is the lack of facts establishing that the issues they raise are likely to recur. The evidence before the trial court and us is that there are no use permits for temporary batch plants still in effect and there are no pending applications under section 10-6.1502(i). Nothing in the record suggests a regularly recurring nature for such applications. Assuming there are future applications, nothing suggests the factual circumstances will be sufficiently similar to give rise to the same issues as here. There is nothing suggesting section 10-6.1502(i) is common to a significant number of local jurisdictions so that the issues will undoubtedly arise somewhere if not in Siskiyou County. On this record, we find the trial court did not abuse its discretion in not exercising equitable jurisdiction to address the issues based only on petitioners' speculation and fear of what the County will do in the future.

IV.

Petitioners Have Not Shown A Basis For A Prohibitory Injunction

Petitioners' final argument to avoid mootness is that effective relief could be granted by the trial court exercising its equitable discretion to issue a prohibitory injunction preventing the County from "repeating its unlawful pattern of conduct in interpreting its duties under CEQA and its County Code." The only authority petitioners cite is *Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 538-540 (*Hewlett*),

superseded by statute on another ground in *United Farm Workers of America v. Dutra Farms* (2000) 83 Cal.App.4th 1146, 1163-1164. *Hewlett* was an unfair competition action brought under Business and Professions Code section 17200. (*Hewlett, supra,* at p. 509.) Petitioners cite us to the portion of the opinion where noting the "extraordinarily broad" remedial power for injunctive relief granted under Business & Professions Code section 17203 (*Hewlett, supra,* at p. 540), this court upheld the trial court's issuance of a prohibitory injunction. (*Id.* at pp. 538-543.) This case is not an unfair competition action to which Business and Professions Code section 17203 is applicable. *Hewlett* provides no authority for the issuance of a prohibitory injunction here.

DISPOSITION

The judgment of dismissal is affirmed. Costs on appeal are awarded to respondents. (Cal. Rules of Court, rule 8.278(a)(1).)

CANTIL-SAKAUYE, J.

We concur:

SCOTLAND, P. J.

HULL, J.